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No. 02-634

In the Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address the following question which may be necessary to resolution of the issue before the Court:

Whether the failure to provide for class action procedures (or the express prohibition of them) in an arbitration agreement renders the agreement inherently unconscionable, such that it cannot be enforced unless class procedures are judicially superimposed.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed amicus briefs in numerous cases to raise issues of vital concern to the nation's business community.

Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those agreements. They utilize arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. Many of those advantages would be forfeited if, as the court below held, the class action device may be superimposed on arbitration. Amicus therefore has a strong interest in urging this Court to reverse the decision below.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus concurs in petitioner's arguments that the Federal Arbitration Act ("FAA") precludes courts from imposing class-wide arbitration on parties that never agreed to such a procedure. Rather than repeat those arguments, this brief addresses a contention that we anticipate respondents and their

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[1] Pursuant to Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the amicus curiae, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

amici will raise — that arbitration agreements that either implicitly or explicitly preclude consumers from pursuing class-wide relief are inherently unconscionable and that superimposition of class action procedures is therefore a necessary precondition to enforcement of consumer arbitration provisions. As discussed below, class-wide actions for damages represent a relatively recent and waivable procedural device. The inability of an arbitral party to demand such a procedure cannot then be fundamentally unfair or unconscionable.

Furthermore, class action procedures are not needed to prevent arbitration from being unfair to respondents and other consumers. We describe below how contracting parties can and do protect against any risk that unavailability of the class action device will discourage valid but small claims, as well as how arbitral institutions have removed any financial obstacles to the filing of such claims. We further show that class actions are not needed to attract claimants' attorneys, given the greater availability of awards of attorneys' fees and extra-contractual damages in arbitration than in court.

Finally, we explain why mandating class procedures actually would undermine the very benefits of arbitration that lead parties to enter into arbitration agreements in the first place — inexpensive, streamlined, and expeditious dispute resolution. A procedure that would undermine these goals cannot possibly be an indispensable prerequisite to enforcement of an agreement to arbitrate.

ARGUMENT

I. THE MONETARY CLASS ACTION IS A RECENT INNOVATION THAT IS NOT SO FUNDAMENTAL THAT ITS UNAVAILABILITY CAN BE DEEMED TO RENDER AN ARBITRATION PROVISION UNCONSCIONABLE

Precluding class-wide resolution of disputes is not inherently unfair or unconscionable. The ability to obtain money

damages in a class action is a relatively recent development, and the type of representative actions historically available in equity differed fundamentally from modern class actions. A procedure of such recent vintage cannot be so fundamental that its unavailability would make an arbitration agreement unconscionable.

The modern class action is "something out of the ordinary, an essentially new turn in legal events." Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977). Although legal historians at one time viewed the modern class action as a descendant of representative actions in seventeenth-century English chancery, more recent research shows those representative actions to have been more like "archaic remnants of a medieval social and litigative structure" than forerunners of the modern class action. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 136 (1987). "Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agricultural communities poised at the edge of a market economy." *Ibid.* Notably, "none" of those group cases involved "actions for money damages." *Id.* at 135. Even today, damages are not available in representative actions in England except in limited circumstances. See Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249, 253 (2001).

In the United States, what we now think of as class actions did not exist until relatively recently. This Court's initial rules of practice for federal courts of equity, promulgated in 1822, did not contain *any* provisions for class actions. See 20 U.S. (7 Wheat.) xvii-xxi (1822). In practice, representative suits were available only as a limited exception to the "necessary parties" rule in equity and could not be relied on to bind absent parties. See *Ortiz* v. *Fibreboard Corp.*, 527

U.S. 815, 832 (1999); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 97 (J. Gould 10th rev. ed. 1892). These limitations largely remained after this Court provided for "group representative litigation" in Equity Rule 48, 42 U.S. (1 How.) xli, lvi (1843), followed by "Representatives of Class" in Equity Rule 38, 226 U.S. 630, 659 (1913). See *Wabash R.R.* v. *Adelbert College*, 208 U.S. 38, 58-59 (1908); *Christopher* v. *Brusselback*, 302 U.S. 500, 505 (1938). Even the original version of Federal Rule of Civil Procedure 23, promulgated in 1937, did little to promote the use of class actions, in part because the circumstances in which absent parties would be bound by a class action ruling remained unclear. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 381 (1967).

"[M]odern class action practice emerged in the 1966 revision of Rule 23" (*Ortiz*, 527 U.S. at 833), which gave federal court class actions their "current shape" (*Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614. For most of its history, then, our legal system did not provide for class-wide resolution of individual claims, and class actions for damages of the type so prevalent today took shape only 37 years ago. Such a recent innovation can hardly be deemed *essential* to prevent dispute resolution procedures from being unconscionable, even if it is a *desirable* litigation option in the circumstances specified by Rule 23.

Furthermore, the right to a class action is "merely a procedural one, * * * that may be waived," confirming that its absence does not in itself render a proceeding unfair. *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). Hence, permitting parties to exercise that waiver by choosing a different procedure to resolve their disputes —

individual arbitration — cannot be fundamentally unfair or unconscionable. Just as parties to an arbitration agreement may "stipulate to whatever procedures they want" (*Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994)), they may agree to exclude remedies and procedures they *don't* want, such as punitive damages (see *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-60 (1995)) and class actions.[2]

The opportunity for parties mutually to determine procedures to resolve their disputes is in large part what distinguishes private arbitration from courtroom litigation. Whereas the parties to an action in federal court cannot es-

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[2] Numerous federal and state courts have held that there is nothing unconscionable about arbitration provisions that exclude class actions. *E.g*, *Lloyd* v. *MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir.), cert. denied, 123 S. Ct. 695 (2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *Lomax* v. *Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076-1077 (C.D. Cal. 2002); *Vigil* v. *Sears Nat'l Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002); *Pick* v. *Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001); *Zawikowski* v. *Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Rains* v. *Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown* v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 n.23 (Haw. 1996); *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1270-1271 (Wash. Ct. App. 2001).

Recently, the Ninth Circuit concluded that class action bans in standard form arbitration agreements are "manifestly one-sided" by their very nature and hence are inherently unconscionable. *Ting* v. *AT&T*, 2003 WL 292296, at *20 (9th Cir. Feb. 11, 2003) (internal quotation marks and alterations omitted). The present case is an appropriate vehicle for dispatching that shibboleth.

cape the federal rules governing discovery, evidence, and appeals, by agreeing to arbitrate they intentionally relinquish "the procedures and opportunity for review of the courtroom." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, what is an arbitration agreement but a waiver of the right to a trial by jury, a right with a far richer pedigree than anything in Rule 23? Yet, it is well established that arbitration agreements are not unenforceable merely because they waive the right to a jury trial. *E.g.*, *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-481; *American Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 710-711 (5th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003). By the same token, agreements to resolve disputes through individual arbitration rather than class action procedures cannot be deemed unconscionable and thus unenforceable. This Court's ruling in *Gilmer* — that a statute expressly authorizing claims on behalf of "other employees similarly situated" did not preclude agreements mandating "individual attempts at conciliation" — cannot be reconciled with any notion that such mandates are *per se* unconscionable. 500 U.S. at 32 (internal quotation marks omitted).

At bottom, the court below is seeking to substitute its own view of procedural fairness for Congress's decision to leave the details of arbitral procedures to the parties. But "unless and until Congress authorizes class certification for purposes of arbitration, [courts] are without the authority to impose it." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 278 (7th Cir. 1995) (Rovner, J., concurring).

II. ARBITRAL CLASS ACTIONS ARE NOT NECESSARY TO VINDICATE THE RIGHTS OF CONSUMERS

Even if the absence of class action procedures could render an arbitration agreement unconscionable in some circumstances, it is quite another matter to hold that precluding class action arbitrations is always unconscionable. Class action

procedures are not needed to protect the rights of consumers. Other protections are available that, unlike class actions, comport with arbitration's consensual framework.

This Court previously has rejected an argument that the costs of arbitrating make individual consumer arbitration agreements inherently unconscionable. *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 91-92 (2000). It instead made clear that whether individual arbitration is prohibitively costly is a case-by-case question. *Ibid.* The answer to that question will vary depending on the claimant's circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement. Since then, the courts of appeals have been fleshing out the precise contours of the claimant's burden to prove that arbitration would be prohibitively expensive. See, *e.g.*, *Morrison* v. *Circuit City Stores, Inc.*, 2003 WL 193410 (6th Cir. Jan. 30, 2003); *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001).

One plainly important factor is whether, and if so how, the applicable arbitration agreement allocates arbitral costs and fees. Many companies have been experimenting with a variety of cost allocation mechanisms to ensure that filing fees and costs do not present an obstacle to the filing of valid claims. For example, one company's arbitration agreement commits it to advance the remainder of arbitration costs after the claimant pays or obtains a waiver of the $75 filing fee. See *Luong* v. *Circuit City Stores, Inc.*, 2001 WL 935317 (C.D. Cal. Mar. 28, 2001). In addition, one of the Chamber's members has drafted an arbitration provision under which it undertakes to reimburse the plaintiff for the filing fee, pay the full costs of arbitration, and, if the plaintiff prevails in the arbitration, reimburse his or her attorneys' fees. Another Chamber member offers to pay all but $100 of the cost of arbitration if the consumer agrees to mediate the dispute prior to arbitrating. Such provisions substantially reduce (if not

entirely eliminate) any financial barrier facing an arbitral claimant.

Furthermore, the costs of consumer arbitration have been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 755 (2001). The American Arbitration Association ("AAA") caps a consumer's responsibility for arbitrator fees at $125 on claims of $10,000 or less, provides for fee waivers or deferrals in hardship cases, and makes arbitrators available to conduct hearings on a pro bono basis. See *Supplementary Procedures for the Resolution of Consumer-Related Disputes and Administrative Fee Waivers and Pro Bono Arbitrators Services*, available at http://www.adr.org. Other arbitral institutions have similar provisions, as noted by Justice Ginsburg in her opinion concurring in part and dissenting in part in *Green Tree*, 531 U.S. at 95 & n.2.

With such contractual and institutional protections available, there is no need to impose class action procedures on arbitration to protect consumers. Nor is there any reason to think that individual arbitration will "choke off the supply of lawyers willing to pursue claims." *Johnson*, 225 F.3d at 374. Many of the statutes on which consumers base their claims provide for exemplary damages, costs, and attorneys' fees to a prevailing claimant (*e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1640(a)(2), (3)), and, absent agreement of the parties to the contrary, arbitrators have the same authority as courts to award such relief. See *AAA Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee, Principle 14. Arbitral Remedies*, available at http://www.adr.org (arbitrators may offer "whatever relief would be available in court under law or in equity"). Indeed, arbitrators have far *greater* flexibility than courts to provide relief on consumer claims. For example, AAA Commercial Arbitration Rule 45 permits an award of "any remedy or relief," including attorneys' fees and costs,

whereas courts generally may not award exemplary damages for breach of contract or attorneys' fees without specific contractual or statutory authority. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (discussing "American Rule" on attorneys' fees); *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2102 (2002) ("punitive damages * * * are generally not available for breach of contract"). The availability of attorneys' fees and extra-contractual damages in individual arbitrations provides plenty of incentive for lawyers to pursue valid claims and confirms that class-wide proceedings are not required to ensure vindication of consumer rights.

Finally, respondents or their amici may argue that class actions must be made available to deter misconduct. As this Court has recognized, however, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and [its] deterrent function." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This Court has rejected arguments that statutory rights are less likely to be vindicated in individual arbitration than in court. *E.g.*, *id.* at 634. Moreover, state and federal agencies designated to protect consumers "possess sufficient sanctioning power to provide a meaningful deterrent." *Johnson*, 225 F.3d at 369; see also *Gilmer*, 500 U.S. at 32 (relying on EEOC's broad authority to protect consumers); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 233 (1987) (same with respect to SEC). Consumers may submit complaints to the FTC by phone at 1-877-FTC-HELP or online at http://www.ftc.gov/ftc/consumer. htm, and state agencies generally are at least as readily available to respond to consumer complaints of misconduct.

III. IMPOSING CLASS ACTIONS ON ARBITRAL PARTIES WOULD UNDERMINE THE BENEFITS OF ARBITRATION

Imposing class action procedures absent agreement of the parties not only would conflict with the consensual basis of arbitration but also would undermine the benefits of arbitration for which the parties did contract.

Section 2 of the FAA makes pre-dispute arbitration agreements "valid, irrevocable, and enforceable" because, as one of its framers explained, "arbitration saves time, saves trouble, saves money." Joint hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. 7 (1924) (Statement of Charles Bernheimer, N.Y. Chamber of Commerce). Congress later elaborated, noting that arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling." H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982). More recently, Congress reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186. This Court, too, has recognized the superior "simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. It cannot be inherently unfair or unconscionable to preclude use of a procedural device that would destroy these arbitral benefits. Yet that is precisely what would result from imposing class action procedures on arbitration.

Arbitration is particularly "helpful to individuals" because it is "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280-281 (1995). It is less expensive in large part because it resolves disputes more quickly. In contrast to the "law's delay" (WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1), the average

length of an AAA arbitration from filing to award is less than six months. *Allied-Bruce*, 513 U.S. at 280 (citing AAA Amicus Brief). Arbitration expedites dispute resolution and otherwise reduces costs by eliminating or significantly reducing pre-hearing motion practice and discovery — summary judgment and depositions are rare — and by severely limiting the bases for appeal.

In contrast, class actions take years. In the Bazzles' case, involving relatively straightforward issues, well over three years elapsed between their motion for class certification and the arbitrator's award. Pet. 7. Certification of a class, whether in court or arbitration, requires notice to potential class members and inquiry into such issues as the adequacy of the purported representatives, conflicts within the proposed class, the commonality of issues of fact and law, and manageability.

The certification process would be far from the only source of costly delays. The streamlined procedures traditionally associated with arbitration would not suffice or be tolerated if defendants faced liability on thousands or even millions of claims in one proceeding. The two arbitration awards in this case, involving relatively modest-sized classes, totaled nearly $27 million. With so much at stake, arbitrator selection would demand as many resources as jury selection does in big court cases. Arbitration's simplicity and informality would become a thing of the past, as big teams of lawyers engage in elaborate motion practice and searching discovery. Arbitral finality would be replaced by endless appeals. To prepare for those appeals, parties would have to arrange for transcription of hearings and request written opinions (instead of the usual bare-bones awards), driving up costs and arbitrator fees.

The transaction costs of drafting arbitration agreements also would increase dramatically. Under the current default rule recognized by *Champ* and other federal and state courts

(see Pet. 15-19), class action arbitrations are precluded unless the parties expressly authorize them. Because this presumption in favor of individual arbitration comports with the expectations of parties who choose arbitration for its speed, low cost, and informality, costly negotiations to modify the default rule and authorize class procedures are rare. Instead, parties freely employ the "generic" arbitration clause recommended by the AAA and other arbitral institutions.

If class action and other judicial procedures were to become the default, as the court below and respondents would have it, these ready-to-go arbitration clauses would no longer be acceptable to many parties. Instead, lengthy negotiations over whether to exclude specific procedures, including class actions, would become the norm. Parties likely to be on the receiving end of any class action claims would seek additional protections, such as three-member panels and heightened judicial review standards, further protracting and adding to the expense of negotiations. Consumers would pay the price if arbitration were to become more like litigation and laden with costly procedures. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers).

The detrimental impact of imposing class action procedures on arbitration would extend beyond cost. The privacy offered by individual arbitration — with no media coverage, a presumption of confidentiality, and unpublished awards — would be all but impossible to maintain in the frenzied atmosphere of a high-stakes class proceeding. The flexibility to tailor proceedings to parties' schedules and avoid disruption to one's business also would go by the boards in arbitrations involving so many claims.

The control that parties now have over the shape of arbitral proceedings also is threatened. Parties now may agree on virtually every aspect of an arbitration, from scope of discovery to admissibility of evidence to the nature of witness testimony to the site of the hearing. In class actions, which "tend to be run by, and for the benefit of, the plaintiffs' attorneys," individual claimants would have to cede their control to class action lawyers. Drahozal, *"Unfair" Arbitration Clauses*, *supra*, at 754. It is no secret that class action attorneys often put their own interests ahead of those of class members, as in "coupon" settlements that provide little benefit to anyone but lawyers. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. REV. 991, 993 (2002) ("In contrast to the class members, [the] class counsel are paid in cash.").

Moreover, class-wide arbitration, as courts advocating it have recognized, "would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating* v. *Superior Court*, 183 Cal. Rptr. 360, 377 (Cal. 1982), rev'd on other grounds sub nom. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). Courts would become heavily involved, not only because so much is at stake, but also because absent class members must be protected. "In the class action, because of manageability problems, the potential for abuse, and the need to protect absentees, judicial control is both more explicit and more pervasive." *Developments in the Law – Class Actions*, 89 HARV. L. REV. 1318, 1389 (1976).

It is no answer to say that arbitrators can supervise class actions as readily as courts. In many respects, arbitral authority is limited. The permissible scope of arbitral subpoenas, for example, is a controversial issue on which the courts are divided. Compare *In re Security Life Ins. Co.*, 228 F.3d 865, 870-871 (8th Cir. 2000) (arbitral subpoenas are enforceable against third parties) with *COMSAT Corp.* v. *National Science Found.*, 190 F.3d 269, 270 (4th Cir. 1999) (arbitral subpoenas are not enforceable against third parties). Furthermore, arbitrators are generally paid by the hour or day or

by the amount at issue and thus, unlike judges, may have a financial incentive to expand the scope of proceedings before them, leading to certifications of inappropriate classes. Courts inevitably would be called on to keep arbitrators in check. Such judicial involvement would multiply proceedings, generate attorneys' fees, and "impose[] costs on consumers." Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001). As this Court has explained, constructions of the FAA that foster the "costs and delay" of litigation should be avoided as inconsistent with the goals of arbitration. *Allied-Bruce*, 513 U.S. at 281.

Just as significant, class actions would deprive parties of a full opportunity to present their case. Unhampered by broad discovery and dispositive motion practice, arbitration offers a virtual "guarantee that there will be a hearing on the merits," in contrast to litigation where few claimants "survive the procedural hurdles necessary to take a case to trial." *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.2d 1465, 1488 (D.C. Cir. 1997). Consumers and other individuals generally benefit from this opportunity to present their case fully. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-47 (1998) (individuals are four times more likely to prevail in arbitration than in litigation). That opportunity will be lost if class actions, and the "intense pressure to settle" they impose on defendants, replace individual arbitrations. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As the Third Circuit has noted, class actions often lead to "lower" recoveries for consumers than individual proceedings. *Johnson*, 225 F.3d at 374. By the same token, arbitration may provide the only realistic opportunity for business defendants to obtain a ruling on the merits rather than being subjected to the inexorable pressure to settle that results from judicial certification of a class.

The loss or reduction of all of these benefits would correspondingly reduce parties' incentives to agree to arbitrate disputes in the first place. If firms are subject to class actions whether they litigate or arbitrate, many will choose to litigate to obtain the greater procedural protections available in court, including effective appellate review. Selecting the reduced formalities of arbitration would be hard to justify with tens of millions of dollars worth of claims subject to resolution at one fell swoop.[3]

Thus, the actual result of upholding the court below would not be fairer or more efficient arbitration — but rather *more litigation* and *less arbitration*. Respondents and their amici seek not to improve arbitration but to destroy it by imposing procedures suitable only for litigation. They thereby hope to move the resolution of consumer disputes out of arbitration and into the courts. At bottom, it is arbitration itself, not lack of class procedures, they find unconscionable. Congress rejected that viewpoint by making agreements to arbitrate individually "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This Court should reject respondents' effort to resurrect the centuries-old "suspicion of arbitration" that Congress sought to bury decades ago (*Gilmer*, 500 U.S. at 30), reaffirm the validity and value of individual arbitration, and prevent the courts from being deluged with consumer disputes that the parties contractually agreed to resolve privately.

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[3] The threat of class action arbitrations may make foreign parties particularly hesitant to enter into agreements calling for arbitration in the United States. Our research has located no foreign jurisdiction that permits class action arbitrations. See *Mitsubishi*, 473 U.S. at 631 (imposing U.S. standards on arbitration would "'imperil the willingness and ability of businessmen to enter into international commercial agreements'") (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 517 (1974)).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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